"BLENDED" FAMILY LAW

RIGHTS AND RESPONSIBILITIES OF STEP PARENTS

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I. INTRODUCTION

The demographics and statistics are clear – families are becoming more complex. Gone are the days when a family lawyer could expect most clients to be part of a traditional nuclear family. Commonly families include children from two or more relationships.

As such, it is imperative that every family law practitioner have a sound understanding of the rights and responsibilities of step-parents in order to advise their clients of their rights and their risks.

This paper will focus on two areas of law respecting step-parents: child support and rights to access.

II. CHILD SUPPORT

When a client seeks advice on the obligation to pay child support for a step-child, or conversely, the right to pursue child support from their former partner, the lawyer must gather sufficient information to advise the client on the following issues:

1. Is there sufficient evidence for a finding of "*in loco parentis*" on an interim or final basis;

2. Are there any other persons who are paying support or who may be obligated to pay support; and

3. How might support be apportioned in the circumstances?

These questions arise from the legislation and case law and are addressed separately below.

A. STANDING: A FINDING OF "*IN LOCO PARENTIS*":

1. The Legal Test:

There is no common law right to pursue child support. The right is a creature of statute. In Saskatchewan married or formerly married clients look to the ***Divorce Act***, to determine their rights and obligations while unmarried clients must consider the provisions of ***The Family Maintenance Act, 1997.***

The ***Divorce Act*** requires that there be a finding that the step-parent stands in the place of a parent, otherwise known as a finding of "*in loco parentis*", before the court can make a child support order under the ***Federal Child Support Guidelines***. The relevant provisions are as follows:

> **2**. (1) In this Act,
> "child of the marriage" means a child of two spouses or former spouses who, at the material time,
> (*a*) is under the age of majority and who has not withdrawn from their charge, or
> (*b*) is the age of majority or over and under their charge but unable, by reason of illness, disability or other cause, to withdraw from their charge or to obtain the necessaries of life; . . . . .
>
> (2) For the purposes of the definition "child of the marriage" in subsection (1), a child of two spouses or former spouses includes
> (*a*) any child for whom they both stand in the place of parents; and
> (*b*) any child of whom one is the parent and for whom the other stands in the place of a parent.

The Family Maintenance Act, 1997 requires that there be sufficient evidence of a settled intention on the part of the step-parent to treat the child as part of his family. On its face this appears to be a higher standard than under the ***Divorce Act,*** but in practice they have virtually been treated the same. The relevant provisions are:

> **2**. (1) In this Act,
> "child " means a person who is under 18 years;

> .....
> "parent" means: ...
> (c) a person who has demonstrated a settled intention to treat a child as a child of his or her family,....

Either way a determination of this "standing" is required before the court can make a child support order under the ***Federal Child Support Guidelines***. In essence – it is a threshold issue that must be proved at the outset of either an interim or final hearing of the matter regardless of whether the parties were married or not.

The leading authority is the Supreme Court of Canada in ***Chartier v. Chartier***, [1999] 1 S.C.R. 242. This was an appeal by the wife from a judgment dismissing her claim for child support. In particular, the issue was whether a person who stands in the place of a parent to a child within the meaning of the ***Divorce Act*** can unilaterally give up that status and escape the obligation to provide support for that child after the breakdown of the marriage.

The court held that the interpretation of the provisions of the ***Divorce Act*** relating to "child[ren] of the marriage" should be "given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects". The interpretation that will best serve children is one that recognizes that when people act as parents toward them, the children can count on that relationship continuing.

This case is often cited in support of the position that once a person is found to stand in the place of a parent, that relationship cannot be unilaterally withdrawn by the adult. The court held that the existence of the parental relationship under s. 2(2)(b) of the ***Divorce Act*** must be determined as of the time the family functioned as a unit, not after the separation when the relationship has broken down.

With respect to the test for determining whether a person stands in the place of a parent, the following paragraphs are often cited:

> 38 What then is the proper test for determining whether a person stands in the place of a parent within the meaning of the *Divorce Act*?

> The appellant argued that the test for whether or not a person stands in the place of a parent should be determined exclusively from the perspective of the child. I cannot accept this test. In many cases, a child will be very young and it will be difficult to determine whether that child considers the person as a parental figure. Further, an older child may resent his or her step-parent and reject the authority of that person as a parent, even though, objectively, that person effectively provides for the child and stands in the place of a parent. The opinion of the child regarding the relationship with the step-parent is important, but it constitutes only one of many factors to be considered. In particular, attention must be given to the representations of the step-parent, independently of the child's response.
>
> 39 Whether a person stands in the place of a parent must take into account all factors relevant to that determination, viewed objectively. What must be determined is the nature of the relationship. The *Divorce Act* makes no mention of formal expressions of intent. The focus on voluntariness and intention in *Carignan*, *supra*, was dependent on the common law approach discussed earlier. It was wrong. The court must determine the nature of the relationship by looking at a number of factors, among which is intention. Intention will not only be expressed formally. The court must also infer intention from actions, and take into consideration that even expressed intentions may sometimes change. The actual fact of forming a new family is a key factor in drawing an inference that the step-parent treats the child as a member of his or her family, i.e., a child of the marriage. The relevant factors in defining the parental relationship include, but are not limited to, whether the child participates in the extended family in the same way as would a biological child; whether the person provides financially for the child (depending on ability to pay); whether the person disciplines the child as a parent; whether the person represents to the child, the family, the world, either explicitly or implicitly, that he or she is responsible as a parent to the child; the nature or existence of the child's relationship with the absent biological parent. The manifestation of the intention of the step- parent cannot be qualified as to duration, or be otherwise made conditional or qualified, even if this intention is manifested expressly. Once it is shown that the child is to be considered, in fact, a "child of the marriage", the obligations of the step-parent towards him or her are the same as those relative to a child born of the marriage with regard to the application of the *Divorce Act*. The step-parent, at this point, does not only incur obligations. He or she also acquires certain rights, such as the right to apply eventually for custody or access under s. 16(1) of the Divorce Act.

The focus is on the intention of the parties and the relationships between them. Financial support is only one part of the analysis. It is possible for there to be a finding of "*in loco parentis*" even when the step-parent did not financially support the child (depending upon ability to pay) but otherwise acted as a parent. In ***Crevier v. Brooks***, 2003 SKQB 447, the step-parent provided childcare, signed her report card, attended parent teacher interviews and continued to see the child after the separation. He did not contribute financially to the

child during the relationship because he was in school and only earning a minimal income. The mother was primarily responsible for supporting the household. The court held that he did stand *in loco parentis* to the child.

This test must also be distinguished from the one required to determine other parental rights. It is possible for a person not to be "*in loco parentis*" for the purposes of child support but to be a person of sufficient interest for the purposes of access rights under ***The Children's Law Act.***

Sandomirsky J. in ***Graves v. Lonechild***, 2006 SKQB 449 concluded that the indicia of familial life and a parent-child relationship did not exist and the petitioner did not stand *in loco parentis*. On the other hand the court held that the petitioner was a caregiver and a person of sufficient interest to the child when he and the mother were residing together and therefore it was in the best interests of the child to spend overnight access alternating weeks with the him.

2. The Test at The Interim Stage:

When the issue is support for children, the court is more likely to err on the side of caution at an interim application. Nevertheless, the onus clearly lies upon the applicant to make out a *prima facie* case for entitlement before the court will consider making an order.

Walker-Bodnarek v. Bodnarek, 2004 SKQB 480 was an application for interim child support. Wilson J. held that on an interim basis the mother need only make out a *prima facie* case for entitlement to receive support for the three step-children. She had provided substantial evidence of the step-father's parental role as regards all three children including school functions, trips and extracurricular activities. In addition, all three children called him "Dad" and he referred to the children as "my son" or "my daughter" to other people. He did not dispute this evidence and the court ordered support.

However in ***Lygouriatis v. Gohm***, 2006 SKQB 448, the same judge dismissed an application for child support on the basis that the mother did not make out the *prima facie* case for entitlement. There was conflict in the evidence regarding the periods of time during which the parties actually lived together and although there was evidence that the step-father was involved in the care of the child, the court was not satisfied that he ever stood in the place of a parent. The evidence also revealed that the child had a very involved birth father.

In ***Sankey v. Aydt***, 2004 SKQB 441, Smith J. also rejected an interim application for child support for three step-children. The parties cohabited for approximately 4 years. The court held that in order to make a *prima facie* case of *in loco parentis* there must be evidence before the court as to the nature and quality of the person's relationship with the child. The court held that it was insufficient to simply observe that the parties lived together as spouses in the presence of young children and expect that it follows that the non-parent put himself or herself in the situation of a lawful parent in the context of the care and charge of the children.

Likewise in ***Prowse-Myers v. Myers***, 2004 SKQB 139, Sandomirsky J held that the requisite "standing in place of parent" never materialized on the facts. The *prima facie* case has not been met, and the application was dismissed.

In ***Butterfield v. Zdunich***, 2003 SKQB 529, Ryan-Froslie J. looked at the test under ***The Family Maintenance Act, 1997*** and held that the onus was on the mother to establish that the step-father is "a person who has demonstrated a settled intention to treat" the step-children as "children of his family". The fact that the father may have supported the children during the parties' relationship was not sufficient in and of itself to bring him within the definition of "parent" though it was a material consideration in that determination.

She further held that the court must be cautious in granting interim support when the ultimate entitlement is in issue. Where a substantial issue arises as to whether an individual qualifies as a "parent" for support purposes, and where there is a secondary issue concerning the potential obligation of the biological father, the court may decline to decide the issue on an interim motion and instead leave it for the determination of a trial judge who will have the opportunity to hear evidence from both parties. In this instance, she was not prepared to make an interim order, and left the matter to the trial judge to determine.

This caution is well illustrated in ***Crevier v. Brooks***, 2004 SKQB 269 where the court at trial reversed the finding made at the interim stage. At trial, Hunter, J. held that the evidence did not demonstrate the step-father had a settled intention to treat the child as his. He was only involved in the care of child when her mother or members of her mother's family were unavailable, he failed to make a significant financial contribution to the household during the period of cohabitation, there was no evidence that marriage was ever discussed or that there was any expectation of permanence in the relationship between the two adults and there was never any discussion that the husband might adopt the child. On those facts the court held that he was not obliged to pay future child support although he was required to pay arrears owing under the interim support order to date of trial as the interim order was not contingent on the finding at trial.

In ***Reetz v. Reetz***, 2002 SKQB 266, Ball J. made an order balancing the concerns respecting the children's need in the interim with the potential prejudice against a step-parent. He ordered that the step-father pay interim support without prejudice to a future determination of the *in loco parentis* issue at trial. He further directed that if it is determined at trial that the husband does not stand *in loco parentis*, any support payable pursuant to the interim order should be deducted from family property and/or spousal support to which the wife would otherwise be entitled.

3. Facts that may Alter a Previous Finding of "In Loco Parentis":

While ***Chartier*** clearly held that the status of *in loco parentis* is not affected by the unilateral withdrawal of the step-parent from the relationship after separation, there have been some cases which consider the withdrawal by the child.

The issue is whether a step-parent can cease to be a person standing in the place of a parent where the step-parent/step-child relationship ceases to be functional due to the unilateral withdrawal of a child or the bilateral conduct of the child and stepparent.

In ***Ollinger v. Ollinger***, 2006 SKQB 433, Sandomirsky J. considered an application to vary support for four children, two of whom were step-children. During the marriage the step-father stood in the place of a parent and was ordered to pay support for the step-children in addition to his biological children. However, since that time the mother has deliberately alienated all four children from the father who had almost no contact with any of them for almost seven years. The step children were ages 19 and 17 at the time of the application to vary and refused to have any relationship with the petitioner despite his efforts.

The court held that the status of "*in loco parentis*" is not static and the list of factors from ***Chartier*** by which the standing may be determined in the first place has equal application when examining if the relationship or standing ceases to exist. Specifically, the court held that if a stepchild of sufficient maturity unilaterally rejects the step-parent, or where there is a bilateral or mutual rejection of one another, absent compelling reasons to the contrary the legal standing with its attendant rights and obligations should cease. The court further stated that the child does not have to be over the age of majority before her unilateral withdrawal or rejection of her step-parent affects standing, provided that she is of sufficient age and maturity to voluntarily choose to withdraw.

In ***Johb v. Johb*** (1998), 168 Sask. R. 266 the Court of Appeal held that while a step-father could not unilaterally terminate his relationship with his step-children, the court appeared to accept that a step-parent's obligation to pay child support for a partner's child may end if the adult-child relationship ends. In that instance the termination of parental status seemed to depend on a "wrongful" act by the custodial parent – denial of access.

In ***Swindler v. Belanger***, 2004 SKQB 459 the birth mother had reconciled with the birth father and the step-parent had been attempting to distance himself from the child and no longer wished to have access to her. The step-father admitted that he stood *in loco parentis* to the child but contended that he was entitled to withdraw from that relationship and ceased to have any obligation to maintain the child because of the reconciliation of the biological parents.

Laing J. agreed. He held that while section 5 of the ***Guidelines*** gives the court discretion to determine the respective levels of contribution between a person who stands in the place of a parent for a child and the natural parent, the section assumes the natural parent has an obligation to pay maintenance pursuant to the legislation by reason of being separated from the child's mother. However, in this case the child was living with her biological father and biological mother in a family unit. The court held that the biological father's obligation to pay child maintenance ended when he reconciled with the respondent and married her in September 2000 which removes the economic rationale for joint and several liability on the part of the person who stood in place of a parent, because in legal terms the child's mother is no longer financially abandoned. The applicant's percentage of ongoing child maintenance for the child was determined to be zero.

This finding was reversed by the Court of Appeal at 2005 SKCA 131. Vancise, J.A. found that the obligation of a person *in loco parentis* remains after separation and cannot unilaterally be changed. The court went on to order a portion of support be paid by the step-parent. The court may have been influenced by the fact that the child's biological father had no income.

In ***Hornoi v. Cornejo-Bilawchuk***, 2004 SKQB 515, a petitioner applied to terminate his long-standing obligation to pay support on the basis that child support that was being paid was ordered on the mistaken belief that the petitioner was the biological father of the child. The parties were only 17 years old when the child was born and assumed the petitioner was the father. They never cohabited as a family. The mother argued that the support obligation should continue on the basis of "*in loco parentis*". Pritchard J. disagreed. She held that for a person to stand *in loco parentis* they must intentionally and voluntarily take on the parental relationship in spite of having no legal obligation to do so. A person who acts as a parent to a child under the belief that he is the biological parent of that child does not assume the parental responsibility in the same manner as one who is not a biological parent. His child support obligations were immediately terminated.

B. THE FEDERAL CHILD SUPPORT GUIDELINES:

1. Section 5:

Once a step-parent is found to be "*in loco parentis*", the court will look to section 5 of the ***Federal Child Support Guidelines*** to determine what amount, if any, is payable in the circumstances. Unlike section 3, section 5 provides the court with discretion on the determination of child support.

Section 5 provides as follows:

> 5. Spouse in place of a parent – Where the spouse against whom a child support order is sought stands in the place of a parent for a child, the amount of a child support order is, in respect of that spouse, such amount as the court considers appropriate, having regard to these Guidelines and any other parent's legal duty to support the child.

The courts have repeatedly found that the language in section 5 affords them greater discretion that the other provisions of the Guidelines. It does not set out a specific formula but simply directs the court to consider the support obligations of other possible

parties. It does not establish any sort of presumptive rule. Rather the court appears to have significant discretion to make whatever award it considers appropriate in the circumstances. This creates an opportunity for advocates.

Some guidance can be obtained by looking at the cases decided to date to determine those factors that weighed in favour of a particular determination.

2. Apportionment Under Section 5:

The courts have considered section 5 as creating joint and several liability on the part of all parents that hold a duty to support a child. Some cases have weighed more heavily on the obligations of birth parents while others have placed the greatest portion of the child support burden upon the step-parent with the most involvement with the child.

In ***Cook v. Kilduff***, 2000 SKQB 347 the court concluded that a claimant cannot unilaterally transfer the full obligation of support, as measured by the *Guidelines*, to the person *in loco parentis*. This case is often cited in favour of the argument that there is an obligation upon a parent seeking support from a step-parent to pursue support from all persons to whom there may be a legitimate claim for support.

However in In ***Walker-Bodnarek v. Bodnarek***, 2005 SKQB 462, Smith J. at para 42 distinguished the ***Cook*** case held that:

> "The contribution to be paid by the biological parent should be assessed independently of the obligations of the step-parent. The obligation to support a child arises as soon as that child is determined to be a "child of the marriage". The obligations of parents for a child are all joint and several. The issue of contribution is one between all of the parents who have obligations towards the child, whether they are biological parents or step-parents; it should not affect the child. If a parent seeks contribution from another parent, he or she must, in the meantime, pay support for the child regardless of the obligations of the other parent."

The following Saskatchewan cases decided over the last 5 years demonstrate how wide the range is in a determination pursuant to section 5.

(a) Full ***Guideline*** contribution from step parent:

(i) In ***Walker-Bodnarek v. Bodnarek***, 2005 SKQB 462, Smith J. held that on the evidence the mother and step-father adopted a lifestyle that explicitly or implicitly decided to exclude from their life the biological fathers of the mother's three children. They consciously formed a family unit which did not recognize the existence of the biological fathers and pointedly looked for no support from them. On those facts, it was held appropriate that the step-father pay child support in the full amount called for under the *Guidelines*.

Similarly, at the interim hearing of the same matter (2004 SKQB 480) Wilson J. ordered that until such time as the natural fathers were brought into the proceedings, the step-father had to pay the full amount for the three step-children.

(ii) In ***Hertlein v. Hertlein***, 2004 SKQB 203, Pritchard J. considered the step-father's request to reduce support taking into account the obligation of the birth father. In that case the child continued to have contact with his birth father, but only minimally and his birth father never supported him. There was never an order requiring the biological father to pay child support. The court held that the step-father's obligation should be reduced by the amount that *prima facie* should be paid by the biological father and reduced the Guideline amount accordingly (in this case it was nominal and the step-father was almost paying 100% of the Guideline amount). She further held that if the biological father becomes financially able to provide support to the son, and the step-father so requests in writing, the mother will be required to apply to the court for an order requiring the biological father to pay child support. If such application is not made within 60 days of the written request, his obligation to pay child support hereunder would automatically be reduced by 50 percent.

(b) 85% contribution from step-parent:

(i) In ***Tyson v. Tyson***, 2004 SKQB 204, Smith J. reviewed section 5 apportionment issues when deciding how much support was payable by a step-parent taking into account the existence of a birth father, two other step-parents and a current common law spouse of the mother. The court held that section 5 converts the *Guidelines* to guidelines, as opposed to a grid which must be obeyed. In apportioning support he considered that while the petitioner had other relationships both before and after the respondent, the reality is that from age five to age 12 the child identified the respondent as his father – the longest relationship he had. In addition, there was an interspousal agreement that identified the child as a "child of the marriage," along with the parties biological children. Nevertheless, the court found that it would be inappropriate to force upon the respondent the full and complete support burden and ordered that 85% of the *Guideline* amount be paid which would be offset against the mother's child support obligations for the other two children in the care of the respondent.

(c) 75% contribution from step-parent:

(i) In ***Mooney v. Mooney***, 2005 SKQB 260, the mother was pursuing child support from a step-parent and the step-parent was asking that the birth father and a subsequent step-parent be added as parties to the proceeding. Baynton J. ordered that the mother be cross examined on her affidavits with respect to the obligations of the other persons but in the meantime ordered the step-father to pay support. In particular, the court considered that it was likely the step-parent had the most significant child support obligation in the circumstances and it was highly unlikely that it would be less than 75 percent even if other individuals are found to have some obligation to support.

(ii) The step-father in ***Vezina v. Vezina***, 2004 SKQB 134, had a long standing parental relationship with the child who did not know he was not her father until the separation. Krueger J. held that although the birth father had never provided any support for her, a legal obligation existed to provide financial support even when another stands in his place and stead. On the other hand the step-father had been the only father the child knew. In balancing these considerations, along with the fact that there was no income information before the court with respect to the birth father, the court ordered that the step-father pay 75% of the difference between the amount payable for one and two children (Guideline support for one child plus 75% of the difference for the second child). The court also stated that in the event that a support order is obtained against the natural father, the father may apply to vary the judgment without the necessity of showing a change in circumstances.

(d) 50% contribution from step-parent:

(i) The Court of Appeal in ***Swindler v. Belanger***, 2005 SKCA 131 Vancise, J.A. calculated the maintenance payable by the step-parent for the step-child over and above what was payable for the biological child and divided it in half.

(ii) In ***Bagu v. Bagu***, 2004 SKQB 185, Wilson J. considered the support payable by a step-father for two children when the birth father was deceased. The children each received $228.00 per month as CPP death benefits and military survivor's pension benefits from their birth father. The court held that it was appropriate to consider the receipt of such benefits in setting the appropriate level of child support payable by the step-parent. In setting support she used the amount halfway between the amount required for four children (two of which were his biological children) and two children.

(e) No contribution from step-parent:

(i) In ***L. (M.M.) v. F. (P.M.)***, 2005 SKQB 348, Ryan-Froslie J. held that section 5 is applied by looking at the *Guideline* amount payable by the step-parent, determining the legal duty of any other non-custodial parent to contribute to the support of the child and then considering whether it is appropriate to reduce the respondent's obligation under the *Guidelines*. She cited ***Vongrad v. Vongrad***, 2005 ABQB 52, at para. 32:

> [T]he Guidelines must be examined in the context of the entire situation of the parties and the child's standard of living while with the biological parents and with the step-parent must be considered. If the amount the child's biological parents can provide is sufficient to maintain a fair standard of support then the step-parent may not have to provide support for the child. However, if the step-parent increased the child's standard of living from that which the child previously experienced, the step-parent cannot simply walk away and return the child to a lower standard of living.

The court considered the amount of support that would be payable if the step-parent had to provide support for both his biological child and the step-child and subtracted the difference from his support obligation to his biological child alone (amount "x"). The court then considered the actual support being paid by the step-child's natural father and noted that the amount exceeded amount "x". As the incomes of the natural father and the step-father were similar, the mother's standard of living had not been increased by the step-parent's role in her life and the mother was gainfully employed, the court was satisfied that the step-child's need were being met by her biological parents and that the step-parent should not have to provide additional support.

(f) Other:

(i) In ***Reetz v. Reetz***, 2002 SKQB 266, the natural father was paying $138 per month for the child. The table amount payable by the step-father for the step-child was $340 more than the amount payable for his biological child. The court ordered that the $138 per month paid by the child's

natural father be deducted from the $340.00, so the step-parent's obligation was reduced to $202.00.

(g) Cases where the Court has weighed the quality of the relationship:

The quality of the relationship between the child and step-parent is a relevant consideration in determining the obligation to pay under section 5 on the basis that it is inappropriate to relegate a step-parent to be nothing more than a funding source.

While the ***Guidelines*** focus on economic considerations, not conduct, there is ample discretion under section 5 to allow for the court to address this issue. Pursuant to s. 5 a court may order a step-parent to pay the presumptive amount of child support or such other amount of support as seems reasonable in the circumstances.

In **Dutrisac v. Ulm** (2000), 6 R.F.L. (5th) 132 (B.C. C.A.), the British Columbia Court of Appeal held that although a step-parent could not unilaterally withdraw from parental status, a court could order him or her to pay less than the Table amount of support to whatever extent seemed reasonable having regard to the actual relationship between the step-parent and child.

The Carswell annotation to **Dutrisac** speaks to this issue: The author notes:

> A biological parent must support his or her minor child regardless of his or her relationship with the child, subject to ss. 15.1(5), 15.1(7), 17(6.2) and 17(6.4) of the *Divorce Act* and s. 10 of the Guidelines, and pursuant to s. 3(1) of the Guidelines, he or she must pay at least the Table amount of support. A court has no general discretion to make whatever order seems fit and just in the circumstances. For example, in *Wright v. Zaver* (June 20, 2000), Doc. 1482/99 (Ont. S.C.J.), 2000 CarswellOnt 2208, a father who had no contact with his son for 15 years at the mother's insistence was ordered to pay the Table amount of support although the parties had agreed and there was a court order that he pay only a small lump sum (which he had paid). By contrast, s. 5 of the Guidelines establishes a discretion-driven analysis to decide step-parent support.
>
> Most of the problem in *Dutrisac v. Ulm* is attributable to the poor drafting of s. 5 of the Guidelines. Section 5 appears to have been an after-thought. The section simply states that a judge can make whatever order he or she thinks for step-parent support. Section 5 does not establish a formula to determine step-parent support, nor does it establish a presumptive rule for step-parent support. Judges and lawyers are left with minimal

> guidance as to how to determine step-parent support.

3. Section 7 Expenses:

Generally section 7 expenses follow a finding of "*in loco parentis*" and thereafter are considered in the same manner as they would be in any other child support proceeding.

However, in ***Woolsey v. Redman***, 2003 SKQB 552, the natural father who was being pursued for support sought a reduction in his section 7 obligation as a result of the existence of a subsequent step-father. He conceded that s. 5 of the ***Guidelines***, does not extend to biological parents and did not suggest that step father share a portion of the table support. However, he did ask the court to consider the step-father's obligation in considering the amount of the s. 7 expense order.

The court held that section 7 directs it consider the "reasonableness of the expense having regard to the means of the spouses" and that in this case the mother's means include a contribution for the child from the step-parent. On that basis Wilson J. ordered a portion of the s. 7 expenses be paid by the father but that a greater portion be paid by the mother and step-father. The court indicated that the mother could pursue the step-father in court for his contribution if he will not contribute voluntarily.

4. Adult Step-Children:

A step-parent may be found to be in loco parentis for an adult child so long as they meet the definition of the applicable legislation. However, there may be stronger arguments in favour of reducing or terminating support when there has been a withdrawal in the relationship by the adult child.

In addition to the cases set out above on this issue, are the cases which consider the obligation to support natural children that refuse to have a relationship with the parent. In **McIndoe v. O'Connell** (2000), 8 R.F.L. (5th) 326 (B.C. S.C.) the court held (para. 30):

> After a child reaches the age of majority however, the fact that a child refuses to communicate with a parent is a factor that the court will

> consider in determining whether a parent has an ongoing obligation under the *Divorce Act* to support a child who refuses to communicate or visit with them (See: *Farden v. Farden* (1993), 48 R.F.L. (3d) 60 (B.C. Master)). The rationale is that the child is an adult and therefore more accountable for their conduct. In addition, adult children are ultimately not as dependent on their parents for financial support as most are more capable of providing for their own financial support than they were when they when under the age of majority.

Likewise in **Law v. Law** (1986), 2 R.F.L. (3d) 458 (Ont. H.C.) Justice Fleury. stated:

> ...Kimberly has certainly withdrawn from the applicant's charge as a result of her failure to maintain any contact with him. Although it is sufficient that she be in the custodial parent's charge, I am of the view that where, as here, a mature child unilaterally terminates a relationship with one of the parents without any apparent reason, that is a factor to be considered by the trial judge in determining whether it would be "fit and just" to provide maintenance for that child. A father-child relationship is more than simple economic dependency. The father is burdened with heavy financial responsibilities and the child has few duties in return. It seems reasonable to demand that a child who expects to receive support entertain some type of relationship with his or her father in the absence of any conduct by the father which might justify the child's neglect of his or her filial duties.

One could argue that this argument applies even more readily when the relationship is between a child and an estranged step-parent.

C. PROCEDURE

Section 5 of the ***Guidelines*** gives the court discretion to determine the respective levels of contribution between a person who stands in the place of a parent for a child and other parents. Unfortunately there is no consistently recognized procedure set by the Rules of Court or common law that provide clear direction on exactly how to ensure that all necessary information respecting those parents who hold a "legal duty to support the child" are properly before the court to ensure a full determination of section 5.

It appears from a review of the case law that the court utilizes two main methods for apportioning support. One involves formally involving the birth parent in the proceeding

and the other is to simply adjust the support on the assumption that the applicant can seek increased support from the birth parent.

Authority for directly involving the other possible payor parents in the proceeding is found at three sources:

Rule 592(4) of ***The Queen's Bench Rules of Saskatchewan***:

> 592 (4) The court at any time may:
>
> (a) order that a person who may have an interest in the matters in issue be served with notice of the family law proceedings with or without adding that person as a party; and
>
> (b) give directions respecting the manner of service on that person and the conduct of the family law proceeding.

Section 27 of ***The Family Maintenance Act, 1997*** states as follows:

> 27 (1) Subject to subsection (2), in any proceeding concerning maintenance, the court, on the respondent's motion, may add as a party another person who may have an obligation to provide maintenance to the same dependant.

Rule 37(2) of ***The Queen's Bench Rules of Saskatchewan*** states:

> 37 (2) Persons may be joined as defendants where:
>
> (b) a common question of law or fact may arise in the proceeding;
>
> (c) there is doubt as to the person or persons from whom the plaintiff is entitled to relief;
>
> (e) their presence in the proceeding may promote the convenient administration of justice.

In ***Overs v. Overs*** (1999), 175 Sask.R. 319 (SKQB), the step-father was found to be *in loco parentis* to the child and the court held that it was "not possible to make an accurate assessment of the financial positions of all the parties involved and apply the ***Guidelines*** to determine an appropriate level of interim child support." At paragraph 14, the court said "given that there is some argument over the issue of split custody and an issue over

the participation of Aaron's biological father in the child support obligation, which will not be determinable without *viva voce* evidence at trial, the interim child support award should reflect these issues."

The court made an interim order requiring the respondent to pay 70% of the basic ***Guideline*** support, and then, pursuant to Rule 37(2), ordered that the birth parent be added as a party and file income information.

In ***Mooney v. Mooney***, 2005 SKQB 260, the step-parent was asking that the birth father and a subsequent step-parent be added as parties to the proceeding. Baynton J. held that he was unable on the evidence before him to conclude that there was a reasonable possibility that either of these parties had a legal child support obligation respecting the child and refused to add them as parties at this stage. However he did order that the mother be cross-examined on her affidavits on the subject, and set a date for the motion to be heard again.

On the other hand, there are many cases which order an apportionment without directly involving the other parent in the proceedings.

In ***Thorvaldson v. Vanin*** (1996), 149 Sask.R. 231 (SKQB), the court speculated that based on the limited information it appeared the birth father did have the means to pay more than the $100 per month he had been paying. The court held that the applicant had an obligation to seek a variation of the 'eight year old' order and made an interim order requiring the step-father to pay $250 per month, stating "this amount is substantially less than the respondent would be required to pay if he was the natural father of [the child], and assumes, without deciding, that the natural father has the financial ability to pay more than he is currently paying toward [the child's] support".

In ***Halliday v. Halliday*** (1998), 164 Sask.R. 12 (SKQB), the birth father was subject to a maintenance order for $250 per month, was in arrears and was nowhere to be found.

Based upon the information the court ordered that the step-father pay 2/3 of the Guideline support payable.

The court can also create an "incentive order" which assumes that further steps will be taken to get the birth parent to pay child support.

In ***Palmer-Sandsbraaten v. Sandsbraaten***, 2005 SKQB 190, Wilson J. ordered that support be paid by a step-father while the mother pursued enforcement of support against the birth father. In this case the mother had not received any support for the child for a considerable period of time. The court held that in such circumstances she should have a period of time to pursue the birth father during which time the step-father should provide full support for the step-child in addition to his natural child and that child support could be reviewed after the petitioner has been provided a reasonable time (four months) to pursue the birth father for his obligation.

D. WAIVER OF CHILD SUPPORT OBLIGATIONS

Lawyers must be cautious when advising clients on child support waivers in prenuptial or interspousal agreements. Clients must recognize that even if there is a waiver in a contract, it may not be enforceable in the event that the issue is taken to court.

Firstly, clients must be aware that verbal promises will be of little consequence.

In ***Hertlein v. Hertlein***, 2004 SKQB 203, the step-father argued that the mother promised at the beginning of their relationship that she would never ask for child support. In considering this argument, Pritchard J. held that at the time the promise was made it was unlikely that the step-father had a legal obligation to her son given the short duration of their relationship. However, the length and substantive nature of their relationship was significantly different at the time of separation. In addition, there was no evidence that the step-father relied upon this apparent waiver of child support when the parties decided to

get married. In the circumstances, any promise not to seek child support for the son was unenforceable.

The Alberta Court of Appeal in ***Jane Doe v. Alberta***, 2007 ABCA 13 dealt with the legality of a pre-nuptial style agreement which provided for a child support waiver. The parties brought an application to determine the legality of such a provision. The decision largely centers on the Alberta ***Family Law Act*** and found that while it is open to the parties to agree to such a provision, "no agreement between the parties can oust the jurisdiction of the court to pronounce upon parental rights and obligations and to depart from written agreements about child support."

This is consistent with the case law generally on waiver of support for natural children. As a result it appears that while the provision in any agreement will be considered by the court as relevant, it will not oust the jurisdiction of the court to consider the issue.

III. PARENTAL RIGHTS

A. STANDING:

There is no automatic standing afforded to a step-parent seeking parental rights respecting a step-child. Unless there is consent or acquiescence by the natural parent, the step parent must qualify as a person of sufficient interest in order to seek relief from the court.

A "person of sufficient interest" may apply under section 6(1)(a) of ***The Children's Law Act*** for access. Section 6 states that:

> 6(1) Notwithstanding sections 3 to 5, on the application of a parent or other person having, in the opinion of the court, a sufficient interest, the court may, by order:
>
> (h) grant custody of or access to a child to one or more persons;
>
> (i) determine any aspect of the incidents of the right to custody or access; and
>
> (j) make any additional order that the court considers necessary and proper in the circumstances.

The **Divorce Act** also provides for the authority for a step-parent who is (or was) married to the natural parent to bring a custody or custody application. There is also provision for "any other person" to bring such an application with leave of the court. These are found at section 16 which reads:

> 16(1) A court of competent jurisdiction may, on application by either or both spouses or by any other person, make an order respecting the custody of or the access to, or the custody of and access to, any or all children of the marriage.
>
> (2) Where an application is made under subsection (1), the court may, on application by either or both spouses or by any other person, make an interim order respecting the custody of or the access to, or the custody of and access to, any and all children of the marriage pending determination of the application under subsection (1).
>
> (3) A person, other than a spouse, may not make an application under subsection (1) or (2) without leave of the court.

While a special designation of "step parent" is not specifically set out in the legislation, there are no restrictions upon those categories of individuals who may be found "persons of sufficient interest" or who may seek leave under s. 16(3).

Rather, the legislation requires a subjective analysis involving the realities of the relationship between the applicant and the child and whether a demonstrable and meaningful bond exists between the child and the person seeking the status.

Once a finding of "*in loco parentis*" is made, status as a person of sufficient interest will almost always follow. The Supreme Court of Canada in ***Chartier*** held that "The step-parent, at this point, does not only incur obligations. He or she also acquires certain rights, such as the right to apply eventually for custody or access under s. 16(1) of the *Divorce Act*." While the fact that one stands in the place of a parent does not determine the right to access, it does mean that the person "*in loco parentis*" has the requisite standing to apply for access.

Conversely, it is not necessary to be found to be "*in loco parentis*" in order to have rights as a "person of sufficient interest". In ***Graves v. Lonechild***, 2006 SKQB 449, the step-father had status as "a person of sufficient interest" even though the court concluded that

he did not stand *in loco parentis*. He was a caregiver to the child and there was evidence that the child developed a connection with him. The court held it was in the child's best interests to have continuing contact and ordered overnight access alternating weeks.

B. THE TEST

As in all matters involving children the test is the best interests of the child. However, unlike the case with natural parents, in the case of step parents there is no presumption that access is in the best interests of the child. The burden of establishing that access will be in the child's best interests is on the party seeking access.

In most of the reported cases where access between a child and a step parent are in issue, there is an agreement between the parties which the court endorses. In some instances the court will specify access where the parties can't agree on the specific times but where access between the child and step-parent is generally accepted.

For example, in ***Bagu v. Bagu***, 2004 SKQB 185, the natural parent wanted access to continue against the wishes of the step-parent. Mr. Bagu was found to be *in loco parentis* for his wife's two children from a previous relationship, and was ordered to pay support for them. The evidence was that the step-child did want to see Mr. Bagu but had conflicts with the daughter of Mr. Bagu's new girlfriend which the court found would be disruptive for his access visits with his two biological children. Mr. Bagu did not want access. The court was unwilling to put the child into a difficult situation, and therefore did not order any access.

In ***Reetz v. Reetz***, 2002 SKQB 266, the mother suggested that the child be given the authority to decide whether or not she spends time with the step-parent. The court disagreed and gave the step-father leave to apply on 14 days' notice if the parties were unable to agree upon a more satisfactory arrangement. The court held that while the child's wishes should be considered, it is not fair to expect her to choose between the parties when it comes to spending time with either one of them.

There are also a number of cases where there is a dispute as to whether access should occur at all. In these cases the court is asked to make an order against the wishes of the natural parent (and often sole custodian).

1. Cases Where Access was Granted:

In ***Thorvaldson v. Vanin***, 1996 CarswellSask 617 (Q.B.), a step-mother brought an application for access to her former partner's children. The court held that under s. 6 of ***The Children's Law Act*** a court may order access for any person having a close enough interest to the children. The mother and her child, and the father's two children, had lived as one family for eight years. The court held that the parties' separation should not deprive those children of a relationship with the mother and her child. As the mother now lived elsewhere and the children visited their natural mother every second weekend, the court held that access should not be overly regimented and the step-mother should have access one Sunday afternoon a month in the city where the children lived, and telephone access once a week.

In ***G.E.S. v. D.L.C.***, 2005 SKQB 246, the court held that there must be evidence which leads to the conclusion that the relationship is a positive one for the child with the primary focus on the best interests of the child. In that case the petitioner was like a step-parent of the children and was a daily care provider while they were young. He assumed this parental role with the consent of the mother. Ultimately the court granted specified access to him against the wishes of the mother.

In ***D. (G.) v. M. (G.)***, 47 R.F.L. (4th) 16 (NWT S.C.), a step-mother applied for access to the child of her former common law partner who no longer agreed that she should have access. The father has problems with alcohol and incarceration, and the child has been a ward of the Crown on occasion. The issues of differing cultures and affluence were also raised in this case. The court held that the principle that contact with both parents is of incalculable benefit to the child has been extended to include a non-biological "parent" where a significant bond has developed between the child and that adult. Furthermore, the

wishes of the biological parent are given deference only so long as they are not in conflict with the best interests of the child.

2. Cases Where Access was Denied:

In ***Elliott v. Mumford***, 2004 NSCA 22, the step-father appealed the lower court's dismissal of his application for leave to apply for custody of child. He had continued to have significant contact with child for about a year after separation when mother told him he could only have supervised access in child's grandmother's home. He then brought the application. The lower court considered the potential for confusion, turmoil and disruption if the step-parent maintained legally enforceable custody or access contrary to the wishes of the mother. The court also considered the fact that the mother may choose to join in a family with another partner. The step-parent appealed but the Court of Appeal held that it was reasonable for the judge to emphasize the possible confusion, turmoil and disruption as the deciding factor. The appeal was dismissed.

In ***S. (J. G.) v. N. (M.)***, 2002 NSFC 19, the applicant applied for an order for access to his step-child and wished to pay child support for her too. The court accepted that he had a close relationship with the child over a fifteen month period. In deciding whether it was in her best interests for the court to grant leave for a full access hearing, the court weighed evidence that the applicant interfered with the access of the child to her natural father and made disparaging remarks about her father in front of the child. Since the separation, the natural father has been able to play a greater role in the child's life. The court held that access would disrupt the relationship between the child and the natural father and dismissed the application.

In ***K. (S.K.) v. K. (D.J.)***, 1995 CarswellBC 610 (S.C.), the mother appealed a decision granting the step-father access to her daughter. The wife had alleged that the husband had sexually assaulted the daughter and opposed his application for access with her and their natural son. The trial judge found that the allegations were unfounded and granted the husband's application. On appeal the court held that there were factors militating against

access which outweighed those in favour. While the trial judge had correctly stated that the issue was dependent upon what was in the best interests of the child, his reasons did not indicate why access would be in the daughter's best interests, but only why they were in the husband's best interests. The court of appeal held that the lower court judge gave insufficient weight to the negative impact of the conflict between the parties on the health of the wife and to the right of the wife, as custodial parent, to decide what was best for her daughter in relation to access demanded by a person who was not a natural parent.

In that case the Court of Appeal also held that the lower court gave insufficient weight to the conflict that existed between the parties. Relations between the parties were so strained that the exchange of the children for access visits had to occur through intermediaries. It was clear that the husband's animosity had a negative impact on the daughter's relationship with the wife and her new husband.

If faced with such an application it may also be instructive to consider cases dealing with other extended family members (usually involving grandparents). In those cases that courts have held that although deference must be given to the parent's decision, the reasonableness of that decision must be considered and set aside when it is in the best interests of the child to do so: ***Tucker v. Lester***, 2002 SKQB 225. Alternatively, where there is "real conflict or hostility" between the custodial parent and the individual seeking access, the child's best interests may not be served by granting access: ***M.A.M. v. M.J.M.***, 2005 SKQB 458.